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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 812

TRANSOCEAN AIR LINES, INC., JEPTHA P. MARCHANT, and JOSEPH A. PERKINS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

TRANSOCEAN AIR LINES, INC., sometimes referred to herein as "TRANSOCEAN", and JEPTHA P. MARCHANT and JOSEPH A. PERKINS, sometimes referred to herein as "MARCHANT and PERKINS", petition for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment entered and opinion rendered by

said Court of Appeals in the above titled cause on August 15, 1967. A copy of said judgment is certified as a part of the Transcript of the Record forwarded simultaneously herewith (TR. 133), and a copy is also attached to this Petition as Appendix B, page A. 7.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated August 15, 1967, rendered upon the entry of said judgment is not as yet reported. A copy of said opinion is certified as a part of the Transcript of the Record (TR. 126), and a copy is also attached hereto as Appendix A, page A 1. The Court of Appeals decision was rendered on an appeal by the United States of America from a judgment of the United States District Court, Southern District of Florida, captioned "Judgment on Mandate", entered April 5, 1966 (TR. 116), and from an order of said District Court entered May 2, 1966, denying the motion of the United States to vacate said "Judgment on Mandate" (TR. 120).

Also pertinent to this Petition is the previous opinion of the United States Court of Appeals for the Fifth Circuit in this matter, dated February 23, 1966, reported in 356 F(2) 702, a copy of which is certified as a part of the Transcript of the Record (TR. 104) and a copy of which is attached to this Petition as Appendix C, page A. 9, and which opinion, together with the judgment of affirmance, a copy of which is certified as part of the Transcript of the Record (TR 115), constituted the mandate, based on which said "Judgment on Mandate" was entered.

The first opinion rendered by the Court of Appeals for the Fifth Circuit in this matter, in **United States** vs. **Associates Air Transport, Inc., et al.**, dated March 8, 1960, is reported in 275 F(2) 827, and is not of paramount importance to the question at hand. A copy of said opinion is certified as a part of the Transcript of Record (TR. 11), and a copy is annexed to this Petition as Appendix D, page A. 17.

JURISDICTION

1. The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on August 15, 1967. A copy thereof is certified as a part of the Transcript of the Record, as aforesaid (TR 133) and a copy is attached hereto as Appendix B, page A. 7.

2. Jurisdiction of this Court for this Petition for Writ of Certiorari is invoked on the basis of 28 U.S.C. §1254(1), and also Supreme Court Rule 19.1(b). Petitioners contend the decision by the Court of Appeals for the Fifth Circuit in the instant case insofar as it is based on its construction of 31 U.S.C. §203, generally referred to as the "anti-assignment" statute, is in direct conflict with the decision of the Court of Appeals for the Second Circuit in **Malman** v. **United States**, 202 F(2) 483, reh. den. 207 F(2) 897 (CA 2, 1958), and the decision of this Court in **United States** v. **Aetna Casualty & Surety Co.**, 338 U.S. 366. The question of Federal law which has not been, but should be, settled by this Court is whether an attorney's contingent fee employment giving the attorney an interest in the judgment that might be entered against the United States or the recovery on such judg-

ment constitutes an assignment that is subject to the provisions of 31 U.S.C. § 203, and is thereby rendered a nullity, or whether it constitutes an assignment by operation of law to which said Statute is not applicable.

Petitioners further contend that the Court of Appeals for the Fifth Circuit has decided a Federal question in a way in conflict with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

QUESTIONS FOR REVIEW

1. After a judgment has been entered in favor of the plaintiff against the United States in a Tucker Act (28 U.S.C. 1346) suit in a Federal District Court, admittedly having jurisdiction of the action, may a judgment be entered in the same action in the plaintiff's attorney's own name against the United States in enforcement of the attorney's charging lien against the judgment based on his contingent fee retainer contract?

2. Does an attorney's lien, based on a contingent fee contract giving the attorney an interest in the judgment recovered, by his client, constitute an assignment subject to and nullified by the "anti-assignment" statute, 31 U.S.C. §203, or does it constitute an assignment by operation of law, not subject to the requirements of that statute?

3. Where no counterclaim or set-off against the plaintiff has been pleaded by the United States in a Tucker Act (28 U.S.C. 1346) suit, in which a judgment

is entered in favor of the plaintiff against the United States, can the United States thereafter defeat recovery by claiming an abstract right to assert a set-off based on contingent claims it did not and does not assert in the suit at hand?

4. Under the provisions of 28 U.S.C. §1652, does the state law of the state in which the forum, a Federal District Court, is situate, govern the enforcement, as well as the allowance of an attorney's charging lien?

5. Does state law, under which a plaintiff's attorney employed under a contingent fee contract who is deprived of the fee to which he would otherwise have been entitled by a settlement effected directly by the parties is entitled to a judgment in the attorney's own name against the defendant in the pending action for the amount of his fee, govern the rights of the attorney for the plaintiff in an action against the United States, pending in a Federal District Court situate in that state and having jurisdiction of the action, under parallel circumstances?

STATUTES INVOLVED

The Statutes involved in the consideration of this matter are listed below, and set out verbatim in Appendix E hereto annexed:

STATUTES	APPENDIX PAGE
28 U.S.C. §1346	A. 50
28 U.S.C. §1652	A. 52
31 U.S.C. §203	A. 53

STATEMENT OF THE CASE

During the Korean conflict, TRANSOCEAN was one of several air carriers which were engaged in carrying military personnel for the United States Military establishment, the so-called CAM flights. A dispute arose between certain of the carriers and the United States as to the proper tariff applicable in computing their compensation for their services, leading to litigation in the District Court for the Southern District of Florida, in which, in August, 1957, TRANSOCEAN intervened as a plaintiff. It employed as its counsel Petitioners, MARCHANT and PERKINS, agreeing to compensate them with a one-third interest in any judgment and/or recovery with authority to collect the proceeds of any judgment and retain their one-third interest before remitting the balance.

The United States admitted jurisdiction of the action under the Tucker Act, 28 U.S.C. §1346. The United States did not, during the entire course of the litigation, plead a set-off or counterclaim against TRANSOCEAN, nor did it move for leave to do so. A judgment was entered in the District Court, and on the first appeal, in **United States vs. Associated Air Transport, Inc., et al.**, 275 F(2) 827 (TR 11) (Appendix D, page A. 17), the Court of Appeals for the Fifth Circuit set out the formula for the compensation of the carriers, including TRANSOCEAN, and remanded the case to the District Court for further proceedings.

On July 14, 1960, the District Court entered a judgment upon the opinion and mandate of the Court of Appeals which provided that the parties should immedi-

ately confer and attempt to reach an agreement and in the event of a disagreement as to the amount due on any of the claims, a reference should be made to a commissioner or special master appointed in the judgment. At this juncture, the Government filed an accounting showing a balance, as computed by it, of $69,785.70 owing by it to TRANSOCEAN. TRANSOCEAN filed an accounting claiming $164,786.68.

Thereafter, TRANSOCEAN filed, in the District Court for the Northern District of California, a petition for an arrangement under Chapter XI of the Federal Bankruptcy Act. The arrangement aborted, and TRANSOCEAN was adjudicated a bankrupt. TRANSOCEAN'S Trustee in Bankruptcy did not move to intervene as a party in TRANSOCEAN'S Florida action against the United States still pending in the District Court, but the Trustee stipulated with the Government that the Florida litigation would be settled for $75,000.00 by a credit in that amount upon the claims the Government asserted against the Bankrupt estate, which claims were allegedly contingent and in excess of $500,000.00. This stipulation and settlement were entered into without notice to and without the knowledge or consent of the District Court Judge, the parties to the Florida action, or MARCHANT and PERKINS, TRANSOCEAN'S attorneys in that action. The California Trustee next attempted to have the Florida District Court action dismissed as to TRANSOCEAN, by his direction to the Clerk of the District Court filed by his California counsel. Thereafter, on motion made by "Transocean Air Lines, Inc. and/or Jeptha P. Marchant and Joseph A. Perkins" the dismissal that was entered by the Clerk on the direction of the Trustee was vacated, and, based on the compromise set-

tlement effected in California, a judgment for $75,000.00 was entered in the Florida District Court action in favor of TRANSOCEAN against the United States. On the following day, MARCHANT and PERKINS filed a petition asserting a charging lien for their attorneys' fees to the extent of the agreed one-third of the recovery, on notice to the United States Attorney, and after a hearing, the District Court entered an order allowing "a charging lien to the extent of their fee to be determined upon the judgment and/or funds" due to TRANSOCEAN (Tr. 88).

An appeal was taken by the United States to the Court of Appeals for the Fifth Circuit from the said judgment of the District Court, from its order allowing MARCHANT and PERKINS a charging lien, and from an order directed to the Clerk of the Court. The Court of Appeals for the Fifth Circuit affirmed the judgment, and rendered its opinion dated February 23, 1966, 356 F(2) 702, (TR 104) (Appendix C, page A. 9). In its said opinion, the Court of Appeals stated:

> "The United States seems to concede that the law of Florida will govern the right to an attorney's lien. Such concession is a proper one."

It further stated:

> "It is not necessary that the question be decided on this appeal but it seems to be the law of Florida that a contract for the payment of attorneys' fees out of the judgment recovered operates as an equitable assignment of the fund pro tanto and creates a lien."

> "It is the Rule in Florida that while parties have a right to settle controversies out of court, any such settlement without the knowledge of or notice to counsel and the payment of their fees is a fraud on them, whether so intended or not."

and that:

> "The lien is annexed to the judgment and is enforceable in the court where the judgment is entered. That court may protect and enforce the lien so that the benefit of the attorneys' services may not be obtained without paying for them."

Thereafter, on motion of Petitioners for a judgment upon the mandate, of the Fifth Circuit, a Judgment on Mandate was entered in the District Court providing that the final judgment previously entered in favor of TRANSOCEAN for $75,000.00 was modified to the extent of awarding MARCHANT and PERKINS a judgment against the United States in the sum of $25,000.00 and reducing the judgment in favor of TRANSOCEAN by that sum, to $50,000.00 (TR. 116). The United States moved to vacate this Judgment on Mandate, and upon the denial of said motion on April 13, 1966, filed its Notice of Appeal from the Judgment, and from the order denying its motion to vacate the Judgment, which appeal resulted in the judgment of reversal entered by the Court of Appeals on August 15, 1967, and its opinion bearing the same date, which your Petitioners now seek to have reviewed by this Court.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The United States did not seek appellate review, by this Court, of the previous judgment of affirmance entered and opinion rendered by the United States Court of Appeals for the Fifth Circuit on February 23, 1966, reported at 356 F(2) 702 (TR. 104) (Appendix C, page A. 9) on the appeal taken by the United States from the judgment entered by the District Court in favor of TRANSOCEAN against the United States for the sum of $75,000.00, and from the order of the District Court which allowed MARCHANT and PERKINS a charging lien on the judgment and/or proceeds thereof in the amount of $25,000.00. The judgment in favor of TRANSOCEAN, and order allowing MARCHANT and PERKINS a charging lien are therefore res judicata settling the validity and amount of the judgment, and the validity and amount of the charging lien. The United States having at the outset admitted the jurisdiction of the Florida District Court over the litigation under the Tucker Act, 28 U.S.C. §1346, cannot now be heard to question or limit the District Court's jurisdiction. **Stoll v. Gottlieb** (1938) 305 U.S. 165, 83 L. Ed. 104, 59 S. Ct. 134; **Durfee v. Duke,** (1963) 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed.(2) 186; **Baldwin v. Iowa State Traveling Men's Association** (1931) 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244; **American Surety Co. v. Baldwin** (1932) 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231.

An opinion rendered by a Federal Appellate Court is part of its mandate. **Miller v. United States** (CA 6, 1949) 173 F(2) 922; **Swalley v. Addressograph-Multigraph Corp.** (CA 7, 1948) 168 F(2) 585, cert. den. 355 U.S. 911, 69 S. Ct. 481, 93 L. Ed. 444.

In **Wilkinson v. Massachusetts Bonding and Insurance Co., et al.**, (CA 5, 1926) 16 F(2) 66, the United States Court of Appeals for the Fifth Circuit held that the District Court in entering a judgment on the mandate of the Circuit Court of Appeals should comply with the intention of that Court, which intention can be inferred from the opinion rendered. It stated, at page 67:

> "The mandate of an appellate Court is to be interpreted reasonably, and not in a manner to do injustice, and the opinion delivered by that Court when it rendered its judgment may be consulted to ascertain what was intended by its mandate."

The District Court, in entering the "Judgment on Mandate", which was reversed by the judgment and opinion which petitioners now seek to have reviewed by this Court, properly carried out the Court of Appeal's intention as expressed in its opinion reported in 356 F(2) 702, above mentioned, by enforcing the charging lien it had previously allowed MARCHANT and PERKINS, after the lien was approved in the Fifth Circuit's opinion of February 23, 1966.

The Court of Appeals announced in said opinion that the State law of Florida governs questions pertaining to the attorneys' lien of the attorneys for TRANSOCEAN; that a settlement was effected between the Government and the Trustee in Bankruptcy of Transocean without the knowledge of MARCHANT and PERKINS, the attorneys for TRANSOCEAN in the cause; that it is the Florida law that while parties have a right to settle controversies out of court, any such settlement without the

knowledge of or notice to counsel and the payment of their fees constitutes legal fraud on the attorneys, whether so intended or not; that the charging lien of MARCHANT and PERKINS is annexed to the judgment and is enforceable in the court where the judgment is entered and that said court may protect and enforce the liens so that the benefit of the attorneys' services may not be obtained without payment therefor. In its said opinion, the Court of Appeals stated:

> "We are told by the Government that there is no basis for entry of a judgment for $25,000.00. The position is taken, apparently, that the $75,000.00 settlement figure was binding only in the event the Florida suit was dismissed. This inference is not warranted."

The Court of Appeals further held, in its previous opinion, that the state law of Florida governs questions pertaining to the attorneys' lien involved in the instant case. Apart from that decision, it is submitted that Florida law governs questions pertaining to an attorney's lien, under the provisions of 28 U.S.C. §1652 (Appendix E, page A. 52).

In its opinion rendered August 15, 1967 (TR. 126) (Appendix A, page A 1) upon the entry of its judgment entered August 15, 1967, which reversed the judgment on mandate, which judgment and opinion petitioners seek to have reviewed by this Court, the Court of Appeals assigns two reasons why Transocean's attorneys are not entitled to a judgment against the United States, firstly, because a judgment in favor of the attorneys directly against the United States is precluded by the doctrine of

sovereign immunity as well as the Government's right of set-off against TRANSOCEAN, and secondly, because TRANSOCEAN'S contingent fee agreement with MARCHANT and PERKINS, its attorneys, constituted an assignment subject to the "anti-assignment" statute, 31 U.S.C. §203, and rendered invalid by that statute. The Court of Appeals stated:

> "The entry of judgment for appellees against the United States would deprive the government of the right to set-off any debts owed to it by Transocean. This demonstrates the need for application of the doctrine of sovereign immunity in such a case."

The Court of Appeals apparently overlooked the fact that although the instant action has been pending for more than ten years, the United States has not at any time during the course of the proceedings asserted or moved to assert a set-off or counterclaim to the claims of Transocean, although the Florida District Court would have had jurisdiction under the Tucker Act, 28 U.S.C. §1346(c) of any set-off, counterclaim or other claim or demand that the United States might have seen fit to assert against TRANSOCEAN. The Court of Appeals' reference to the Government's right to set-off against TRANSOCEAN obviously refers to an abstract or possible right of set-off, as there is nothing in the record to show an actual claim asserted against TRANSOCEAN by the Government.

The decision of the Fifth Circuit in the instant case, insofar as it construes the "anti-assignment" statute and holds that an attorney's contingent fee interest in a judg-

ment is an assignment subject to the "anti-assignment" statute is in direct conflict with the decision of the Second Circuit in **Malman** vs. **United States**, 202 F(2) 483, reh. den. 207 F(2) 897, (CA 2, 1953) where the Second Circuit, on affirming a judgment of the District Court which dismissed, for lack of jurisdiction, the complaint filed against the United States by an attorney to enforce his statutory attorney's lien by reason of his recovery of a refund for his client from the Government, stated that it affirmed, not on jurisdictional grounds, but on the merits, by reason of the Government having a valid set-off for taxes antedating the plaintiff's attorney's lien. It held that the "anti-assignment" statute, 31 U.S.C. §203, did not apply to the assignment as the plaintiff sued as an assignee by operation of law.

It further stated concerning **United States** vs. **Sherwood**, 312 U.S. 584, one of the cases relied upon by the Fifth Circuit for its application of the "anti-assignment" statute:

> "A majority of this court think that decision never had any application to a case like this."

The decision of the Fifth Circuit also appears to be in conflict with the decision of this Court in **United States** vs. **Aetna Casualty & Surety Co.** (U.S. S. Ct., 1949) 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 971, where this Court on reviewing actions brought by insurers under the Federal Tort Claims Act, held that insurance companies could bring suit against the Government in their own names under that Act upon claims to which they had become subrogated. This Court, in rejecting the Government's argument that R.S. Sec. 3477, the "anti-assignment"

statute, was a complete bar to recovery, and in limiting the rule of **Nutt** v. **Knut**, relied upon and cited in the Government's brief, and other early cases that placed a strict construction on the "anti-assignment" statute, stated, at page 212:

> "This construction of R.S. § 3477—that assignments by operation of law are not within the prohibition of the statute—was recognized as settled law in Goodman v. Niblack, supra, and has been repeated with approval in a great many subsequent cases."

This Court further quoted, at page 216, the following language of Judge Cardozo in a New York Court of Appeals opinion:

> "The exemption of the Sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." (Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30).

It is submitted that the rationale of the decision by this Court in the **Aetna** case is applicable in a Tucker Act case, and to the instant action.

In its previous opinion dated February 23, 1966, (356 F(2) 702) Appendix C, page A. 9, the Fifth Circuit held that the law of Florida governs the right to an attorney's lien, that the lien is annexed to the judgment and is enforceable in the court where the judgment is entered. It is established as the law of Florida that where the

parties to an action settle an action directly, the effect of which is to deprive the attorney for the plaintiff of his contingent fee, the court may award judgment in the action in favor of the plaintiff's attorney against the defendant for the attorney's fee. **Joel Strickland** vs. **Ronald Frey d/b/a Kuhl Avenue Motors,** (Fla. D.C.A. 4, June 8, 1966, reh. den. June 21, 1966) 187 So.(2) 84.

In the instant case, the District Court, in entering a judgment in favor of MARCHANT and PERKINS, directly against the United States, for the amount of their contingent fee, proceeded not only in accordance with Florida law, but also in accordance with Federal law, acting as a court of equity. The District Court exercised its equitable jurisdiction in allowing counsel for TRANSOCEAN a charging lien, thereby converting their equitable lien into a charging lien. Thereafter, the District Court, as a court of equity, was empowered to render complete relief in the cause to the attorneys for TRANSOCEAN even though the court was thereby called upon to determine legal rights that would otherwise not be within the range of its authority. **McGowan** vs. **Parish** (1915) 237 U.S. 285, 35 S. Ct. 543, 59 L. Ed. 955, **Camp** vs. **Boyd,** (1913) 229 U.S. 530, 57 L. Ed. 1317, 33 S. Ct. 785. It is submitted that the District Court, having jurisdiction of the cause, had jurisdiction as to all matters that arose in the cause, including the enforcement of the judgment entered, and had jurisdiction to enter judgment in favor of the attorneys for TRANSOCEAN directly against the United States for the amount of their charging lien against the judgment and the proceeds thereof.

CONCLUSION

The judgment and opinion of the Fifth Circuit, which Petitioners seek to have reviewed by this Court is, insofar as it construes 31 U.S.C. §203, the "anti-assignment" statute, in couflict with the decision of the Second Circuit in **Malman** vs. **United States,** supra, and that of this Court in **United States** vs. **Aetna Casualty & Surety Co.,** supra. The decision of the Fifth Circuit should be reviewed by this Court, the conflict resolved, and the rule established that an attorney's contingent fee contract, giving the attorney an interest in a judgment against the United States, results in an assignment by operation of law, and that such assignment is not controlled by, and nullified by, the "anti-assignment" statute.

Furthermore, the Fifth Circuit has failed to follow the rationale of this Court in **United States** vs. **Aetna Casualty & Surety Co.,** supra, including that concerning set-offs and counterclaims which the Government may have against the assignor, and erred in taking cognizance of an abstract right of set-off that the United States might claim, where in fact no set-off or counterclaim was asserted by the United States in the action.

It is submitted that the District Court, in allowing a charging lien and, thereafter, in entering a judgment in enforcing such charging lien in favor of MARCHANT and PERKINS, the attorneys for TRANSOCEAN, directly against the United States for the amount of their charging lien, acted within its powers as a court having jurisdiction of the cause of TRANSOCEAN and acted within the scope of its authority, both in accordance with the State law of Florida, as directed by 28 U.S.C. §1652,

and in accordance with Federal law, under its general power as a court of equity, called upon to enforce an equitable lien.

The decision of the Fifth Circuit should be reviewed by this Court, the conflict between it and the above mentioned decisions should be resolved, and the Judgment on Mandate entered by the District Court should be affirmed by reversal of the Judgment entered by the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23933

UNITED STATES OF AMERICA,

Appellant,

versus

TRANSOCEAN AIR LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(August 15, 1967.)

Before WASHINGTON,* TUTTLE and SIMPSON, Circuit Judges.

TUTTLE, Circuit Judge: This is the third appeal of this case. Appellee Transocean, now a bankrupt, was one of several irregular air carriers engaged in transportation for the Government during the Korean conflict. A dispute arose between the carriers and the Government as to the basis for compensation for their services. The carriers brought suit in the District Court for the South-

*Senior Judge, D. C. Circuit, sitting by designation.

ern District of Florida, and the Government admitted jurisdiction under the Tucker Act, 28 U.S.C.A. 1346. On appeal, **United States v. Associated Air Transport**, 275 F.2d 827, this Court set out the standards under which the carriers, including Transocean, were to be compensated. The case was remanded to the District Court for further proceedings. Representing Transocean in that litigation were Jeptha F. Marchant and Joseph A. Perkins who, in a contingent fee arrangement, were given a one-third interest in any recovery obtained.

Following remand of the **Air Transport** case, and before any money judgment had been entered in Transocean's favor, the air carrier was adjudged a bankrupt. At this point, the United States and the trustee in bankruptcy in California, with the approval of the bankruptcy court for the Northern District of California, stipulated settlement of the Florida litigation for $75,000 by a credit against the Government's larger claim against the bankrupt's estate. The trustee asked to have the Florida suit dismissed with prejudice, and dismissal was entered by the clerk. Marchant and Perkins then filed a motion in the Florida District Court reciting that as a result of the compromise in the Northern District of California, they were entitled to a minimum of $25,000 for their services.

The District Court of Florida entered judgment vacating the clerk's entry of dismissal and awarded $75,000 to Transocean based upon the compromise in the Northern District of California. Following entry of the judgment, Marchant and Perkins petitioned the Court for a charging lien on the judgment of one-third, or $25,000. The petition was granted.

The United States appealed from both the judgment for Transocean and the order allowing the lien thereon in favor of Transocean's counsel. This Court affirmed the judgment and order in **United States v. Transocean Air Lines, Inc.**, 356 F.2d 702. Based on our opinion in that appeal, the Florida District Court then granted appellees Marchant and Perkins a judgment directly against the United States in the sum of $25,000 and reduced Transocean's judgment to $50,000. This action was not authorized by our opinion and mandate in that case, and accordingly we reverse.

Our affirmance of the district court's action in **United States v. Transocean Air Lines, supra,** was founded primarily on the procedural ground that the trustee in bankruptcy was not a party to the litigation and hence could not stipulate its dismissal. F.R. Civ. P. 41. The secondary ground for affirmance was that an attorney's charging lien cannot be defeated even by a stipulated dismissal by the parties, where the attorney, is not given notice. 5 Moore's Federal Practice 1025, Par. 41.02; **Ingold v. Ingold,** S.D. N.Y. 1939, 30 F. Supp. 347.

With regard to the second ground, the government raised several contentions. It was our language used in disposing of these contentions which the district court mistakenly construed as authorizing a judgment directly against the United States.

We dismissed the government's contention that there was "no basis for the entry of a judgment for $25,000." The issue here was not the validity of the judgment declaring the existence of the lien. The government contested the figure of $75,000 as the arithmetical basis for

computation of the one-third lien. The government's position was that the $75,000 stipulation was not a settlement, as such, of the Florida litigation but a contractual promise to allow a set-off which was conditioned upon dismissal of the Florida suit. We rejected this argument.

The government had earlier contended that no lien existed. In distinguishing the case relied upon by the government, we noted that our decision in **United States v. Associated Air Transport, supra,** had determined Transocean's right to recover and the formula by which the amount of recovery was to be calculated. We said, "The judgment was such as ripened the charging lien of counsel and gave to them a vested right to participate in the recovery." This does not go so far as to authorize an independent judgment directly against the United States.

The right to participate in a judgment **res** is altogether different from a cause of action directly against the judgment debtor. We are told that the law of Florida authorizes such a judgment, predicated upon a charging lien, directly against a private debtor. As against the United States, however, we are of the opinion that such a procedure is precluded by the doctrine of sovereign immunity as well as by the government's right to set-off against Transocean.

Transocean's claim against the United States was brought under the limited consent granted in the Tucker Act. Appellees' claim, on the other hand, stems solely from their contract with Transocean, and is dependent upon the law of Florida which allows the transmutation of a lien against a judgment into a judgment against the debtor. The right to sue the United States cannot be

granted by State law nor acquired through contractual relationships with third parties. The right can be acquired only by the specific consent of Congress, which is not present here. **United States v. Sherwood**, 312 U.S. 584.

Furthermore, it cannot be said that this suit is authorized as an assignment of Transocean's Tucker Act claim. First, the consent granted in the Tucker Act was exhausted when Transocean acquired its final judgment. Appellees are only entitled to participate in the judgment res if there be any. The Tucker Act does not authorize continued assignments and suits against the sovereign.

Second, there could be no valid assignment of Transocean's claim to appellees. A contingent fee in a judgment against the United States is an assignment subject to the Anti-assignment Act, 31 U.S.C. 203. **Kearney v. United States**, 285 F.2d 797 (Ct. claims 1961). As such it is invalid unless created in compliance with the provisions of the Act, which include the required issuance of a warrant for payment by the Comptroller General. The comptroller, however, is authorized to withhold payment of any debt owed by the government with respect to which the government has a right of set-off. 31 U.S.C. 227. Here it is apparent that the government's claims against Transocean may far exceed Transocean's $75,000 judgment against the United States. While the record before us does not permit us to determine the state of accounts between the parties, it is clear that there is much more involved in the propriety of entering such a judgment against the United States than the simple defense of sovereign immunity. This is true because were we to sanction this proceeding, the way would be clear for a government creditor, owing the United States a larger amount than

his own claim, to prevent an off-set by permitting an attorney's lien to be created against the claimed fund (here a judgment against the United States). The entry of judgment for appellees against the United States would deprive the government of the right to set-off any debts owed to it by Transocean. This demonstrates the need for application of the doctrine of sovereign immunity in such a case.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23933

D. C. Docket No. 6817-M-Civil Action

UNITED STATES OF AMERICA,

Appellant,

versus

TRANSOCEAN AIR LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before WASHINGTON, * TUTTLE and SIMPSON, Circuit Judges.

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*Senior Circuit Judge, D.C. Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

August 15, 1967

Issued as Mandate: Sept. 6, 1967

APPENDIX C

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 21877

UNITED STATES OF AMERICA,
Appellant,

versus

TRANSOCEAN AIR LINES, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(February 23, 1966.)

Before JONES and BELL, Circuit Judges, and JOHNSON, District Judge.

JONES, Circuit Judge: Transocean Air Lines, Inc., which is nominally an appellee in this cause, was one of several irregular air carriers which were engaged during the Korean conflict in transportation for the account of the United States. A dispute arose between the carriers, or some of them, and the Government resulting in litiga-

tion in the District Court for the Southern District of Florida. This Court, in 1960, set out the basis upon which the carriers were to be compensated. **United States v. Associated Air Transport,** 275 F.2d 827. Transocean had intervened as a plaintiff in the action in August of 1957, more than eight years ago. It employed as counsel Messrs. Jeptha P. Marchant and Joseph A. Perkins of the Miami bar to represent it in the litigation and agreed to compensate them with a one-third interest in any judgment, with authority to collect the proceeds of any judgment and retain their one-third interest before remitting the balance. The judgment of this Court was issued on April 19, 1960. On July 14, 1960, the district court entered a judgment upon the opinion and mandate of this Court. It was provided in this judgment that the parties, the plaintiff-intervenors, including Transocean, and the Government should immediately confer and attempt to reach an agreement. In the event of a disagreement as to the amount due on any of the claims, a reference should be made to a commissioner or special master appointed in the judgment. At this juncture the Government filed an accounting showing the balance, as computed by it, of $69,785.70 owing by it to Transocean.

Transocean, after an unsuccessful effort to get its affairs worked out by a Chapter XI Bankruptcy arrangement, became a conventional bankrupt and John Costello was appointed as its Trustee. The bankruptcy proceedings are in the District Court for the Northern District of California. In the bankruptcy proceeding the United States asserted priority claims in excess of $500,000. The United States and the Trustee in Bankruptcy, in California, stipulated that the Florida litigation would be

settled for $75,000 by a credit upon the claim of the Government. This agreement was approved by the district court in California. The next move was the filing, in the district court of Florida, of a paper which, before the adoption of the Rules, might have been styled a praecipe. It was styled "Dismissal with Prejudice" and was addressed to the clerk. It authorized and directed the entry of a dismissal with prejudice of the intervention of Transocean. It was signed by the Trustee and his California counsel. A motion was made in the names of "Transocean Air Lines, Inc., and/or Jeptha P. Marchant and Joseph A. Perkins" reciting that as a result of the compromise for $75,000 Marchant and Perkins became entitled to a minimum of $25,000 and that nothing remained to be done in the litigation except a simple accounting. The motion sought the "Dismissal with Prejudice" be stricken and that the clerk be instructed to file nothing except on order of the Court. In the alternative, Messrs. Marchant and Perkins asked for judgment of not less than $25,000. California counsel for the Trustee sent Marchant and Perkins a telegram stating that the latter were not authorized to move to vacate the dismissal on behalf of the Trustee.

A judgment was entered by the district court vacating the clerk's entry of dismissal, reciting a compromise settlement of $75,000, and adjudging that Transocean recover $75,000 from the United States. On the day after the entry of the judgment, Marchant and Perkins filed a petition asserting a charging lien for their attorneys' fees to the extent of the agreed third of the recovery. After a hearing, the court entered an order allowing "a charging lien to the extent of their fee to be determined upon the judgment and/or funds" due to Transocean. The

Government has appealed from the judgment and the order allowing the lien.

The Government insists that it was error for the district court to strike the Trustee's dismissal. The adjudication in bankruptcy of Transocean did not, of itself, substitute the Trustee in bankruptcy in the litigation pending in Florida. There should have been a motion and an order. Since the Trustee did not seek to be substituted for Transocean, it did not become a party. Rule 25(c) Fed. Rules Civ. Proc., 28 U.S.C.A.; **Liberty Broadcasting System v. Albertson,** W.D. N.Y. 1953, 15 F.R.D. 121. In one of the hearings before the district court an attorney was present who announced that he was there as an observer for the California counsel for the Trustee but for no other purpose. It might be assumed that the Trustee wished to avoid any act that might be regarded as the act of a party to the cause. Even though the bankruptcy Trustee had become a party, which he did not, the dismissal could not have been effected without an order of the court. Only when there has been a notice of dismissal filed before the filing of an answer or motion for summary judgment, or when a stipulation of dismissal has been filed by all parties, can a dismissal be effected without a court order. Rule 41(a)(1) Fed. Rules Civ. Proc. 28 U.S.C.A. Without a dismissal, properly obtained, the cause remained pending in the name of Transocean. Cf. **Meyer v. Fleming,** 327 U.S. 161, 66 S.Ct. 382, 90 L.Ed. 595. The motion to strike the dismissal was filed on March 6, 1964. In the record, filed on April 7, 1964, is a copy of an order of the California Referee in Bankruptcy authorizing the Trustee to compromise the Florida litigation, and annexed is a copy of a stipulation reciting that the United States had filed claims of more than $500,000, which are referred to as

"contingent," purporting to settle the Florida litigation for a set off of $75,000 against the Government claims. The Rule requires that for a dismissal by stipulation to be effective, the stipulation must be filed. The stipulation was not apparently intended as a dismissal. It provides that "the trustee will forthwith dismiss." The contemplated dismissal was not to be effected by the stipulation but by an act of the Trustee to be done subsequently. The Trustee, not being a party, could not have stipulated under the Rule even though there had been an effort to procure a dismissal by stipulation.

The dismissal was improperly entered and should have been set aside, not only for the technical reasons heretofore assigned, but because a perfected charging lien of attorneys cannot be defeated by a dismissal by stipulation under Rule 41. 5 Moore's Federal Practice 1025, Par. 41.02[2]; **Ingold v. Ingold**, S.D. N.Y. 1939, 30 F.Supp. 347.

The United States urges that Messrs. Marchant and Perkins have no lien. The United States seems to concede that the law of Florida will govern the right to an attorney's lien. Such concession is a proper one. **Webster v. Sweat**, 5th Cir. 1933, 65 F.2d 109. The United States stresses **Sentco, Inc. v. McCulloh**, Fla., 84 So. 2d 498, to sustain its contention that there is no lien in this cause. The **Sentco** case was not wholly unlike the case before us, but the differences preclude it from being a precedent requiring the United States to prevail. In **Sentco**, as here, the plaintiff's counsel had a case on a contingent fee basis. There, as here, they had been successful on an appeal, and thereafter a settlement was made without reckoning

with counsel. But the parallel goes no farther. In **Sentco** the court on the first appeal said in its opinion, "any award for damages would be pure speculation." **Sentco, Inc. v. McCulloh**, Fla., 68 So. 2d 577, 581. In this case the right to recover was upheld on appeal and the formula was stated as the basis for computing the amount. On remand a judgment was entered directing that the parties attempt to reach an agreement as to the amount due and in the event of disagreement such matters should be presented to the Commissioner [Special Master] for determination of the amounts due. Nothing remained to be done but the making of the computation. The right of Transocean to recover was determined and only the amount was to be fixed. The judgment was such as ripened the charging lien of counsel and gave to them a vested right to participate in the recovery. It is not necessary that the question be decided on this appeal but it seems to be the law of Florida that a contract for the payment of attorneys' fees out of the judgment recovered operates as an equitable assignment of the fund pro tanto and creates a lien. **Foreman v. Kennedy**, 156 Fla. 219, 22 So. 2d 890.

It is the rule in Florida that while parties have a right to settle controversies out of court, any such settlement without the knowledge of or notice to counsel and the payment of their fees is a fraud on them, whether so intended or not. **Miller v. Scobie**, 152 Fla. 328, 11 So.2d 892. See **Mabry v. Knabb**, 151 Fla. 432, 10 So.2d 330; **Harper v. Strong**, 185 Fla. 10, 184 So. 848. Where an action was dismissed on stipulation after a settlemer which ignored the rights of counsel under a contingent fee agreement, the order of dismissal would be reversed so

that the case could be continued for the enforcement of the lien of counsel. **Miller v. Scobie, supra.**

The Government makes the contention that the district court in Florida was without jurisdiction to determine the lien claim or to permit recovery of attorneys' fees. The remedy, says the Government, is to file a claim in the bankruptcy proceedings. The lien is annexed to the judgment and is enforceable in the court where the judgment is entered. That court may protect and enforce the lien so that the benefits of the attorneys' services may not be obtained without paying for them. **Reid v. Aderhold**, 5th Cir. 1933, 65 F.2d 110, cert. den. 290 U.S. 676, 54 S.Ct. 104, 78 L.Ed. 584. See also **Sherman v. Buckley**, 2nd Cir. 1941, 119 F.2d 280, cert. den. 314 U.S. 657, 62 S.Ct. 110, 86 L.Ed. 527. It may be appropriate at this point to say that the objections to the court's jurisdiction are not raised by the Trustee but by the Government.

We are told by the Government that there is no basis for the entry of a judgment for $25,000. The position is taken, apparently, that the $75,000 settlement figure was binding only in the event the Florida suit was dismissed. This inference is not warranted. There was nothing conditional in the stipulation that "The agreed sum of $75,000, which sum constitutes the settlement of the Florida action herein above referred to will be set off against the claims of the United States filed in the subject [bankruptcy] proceedings in the Northern District of California." While not so intended, the stipulation between the Government and the Trustee was about such a stipulation as the district court, in its judgment on the mandate of this Court, directed the parties to attempt. By a footnote in its brief the Government says that "it goes without saying" its

liability under this Court's opinion would not equal $75,000. It urges that it agreed to $75,000 as a value to the Government of ending the litigation. The Government, in the Florida proceedings before the dismissal was attempted, submitted figures showing a liability of $69,785.70. In the brief of the appellees it is stated that "obviously" the amount due Transocean exceeded $75,000. There is no repudiation of the settlement. It was submitted to and approved by the bankruptcy court. We see no reason why the Government should not be bound by it as a basis for a determination of the percentage fee of Transocean's counsel.

The judgment of the district court has reached a result in conformity with the applicable law and which does justice to the parties. The judgment is

AFFIRMED.

APPENDIX D

[Title Omitted]

(March 8, 1960.)

Befores RIVES, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: This case involves domestic air transportation of military personnel during the Korean defense emergency by chartered air carriers. The immediate question is whether the Government is liable for ferry miles actually flown but which were in excess of the mileage specified in charter bids. Underlying that is the construction and application of the filed tariff. And collateral to this is the question of the right of the Government to invoke equitable estoppel against the Carrier's collecting payment on the basis of the filed tariff.

In a figure indigenous to the case, the District Judge, affirming completely the special master's report,[1] steered

[1]The hearings before the special master (called a Commissioner) were extensive covering approximately 40 days with 2400 pages of testimony, several hundred numbered exhibits, some of which were mere numbers identifying further cartons and boxes of unnumbered papers. The Commissioner's Report, undoubtedly the product of much lucubration, Livesay Window Co. v. Liveway Industries, 5 Cir., 1958, 251 F.2d 469, 470, is an exceptional piece of work, well organized, complete and self-explanatory. It alone comprises 224 pages of the printed record.

The Commissioner's fact findings, adopted by the District Court, are not here challenged. Indeed, prepared and first filed as a proposed report under F.R.Civ.P. 53(e) (5), it is so constructed that many crucial fact findings are expressly described as "finding on which the parties are in agreement." The closest, and only attack on fact finding or fact inference is the Government's specification of error No. 2:

> "2. The District Court erred in holding that a requirement by the Government that billings for past charter flights be supported by documentary proof that the ferry mileage claimed had actually been flown is sufficient to charge the Government with specific knowledge that the ferry mileage was not accurately stated in the carrier's bids for subsequent charter contracts."

an instrument course somewhere between that diversely plotted by the Carrier and the Government. He held straight on the beam, as he was obviously bound to, that the tariff was valid and applicable. But then followed some diversions apparently to avoid apprehended inequitable turbulence. For he held that in order for the Carrier to recover for ferry mileage flown in excess of that bid, the Carrier had to show that, when the bids were received and evaluated, the Government knew that the ferry mileage was estimated only. The question of fact of such knowledge produced another departure. For he determined that the Government did not have that knowledge prior to June 25, 1953. After that date, due to the new requirement that supporting data accompany all billings for completed charter flights, the Government knew generally that ferry mileage bid was an estimate only.

This satisfied no one, and all appeal.[2] We conclude that the District Court's flight plan was faulty and reverse.

I.

Associated is an irregular air carrier. In 1951 it, along with others, was authorized by the Civil Aeronautics Board to provide common carrier charter service to the military without limit as to frequency or schedules. This, the Government's brief candidly tells us, was to "help satisfy" the "sharply increased need for domestic transportation" with which "the armed forces were faced"

[2]Associated's claims comprise 154 commercial air movements (called CAM's). Of its total claim of $50,353.40 the Court allowed $16,479.55. The Government counterclaimed as to 134 CAM's for ferry mileage bid and charged for but not actually flown. Of its total counterclaim of $38,213.33 the Court allowed $20,843.93. This resulted in a net award to the Government of $4,364.38.

because of the "expansion of the National Defense Program following the outbreak of the Korean hostilities." Thereafter Associated and others through their agent IMATA[3] entered into joint agreements[4] with the several armed services which prescribed the procedure for making the individual charters for commercial air movements (called CAM). The Joint Agreements provided that charges were to be computed in accordance with tariffs mandatory filed with CAB. The tariff, discussed later in detail, prescribed specific mileage rates for charter (live) miles (while the plane was carrying passengers) and ferry miles (while ferrying empty prior and subsequent to the passenger carrying leg).

Individual charter contracts were set up this way. The military post or base requiring transportation made its needs known to its service headquarters at the Pentagon. The service transportation office would then request bids from the agents, such as IMATA, representing air, rail and bus carriers. The bids submitted for air carriers identified the particular carrier and aircraft. Further, they set forth the points of origin and destination, both for ferry flights and the charter (live) flight together with the respective mileages. The dollar cost shown on the bids was the sum of the ferry mileage charge (front and rear ferry miles multiplied by tariff rate for ferry miles) and the charter mileage charge (charter miles multiplied by tariff rate for charter miles).[5]

The bids were evaluated on a comparative basis by

[3]IMATA was one of three competing associations authorized by CAB to represent air carriers in arranging military charters. The others were ATA (Air Transport Association) and ACTA (Air Coach Transportation Association).

[4]These were Joint Military Irregular Air Transport Agreements Nos. 1 and 2.

[5]An example will help. On request for charter movement of passen-

the service and a charter was awarded to the carrier best meeting the needs of the military. Comparative cost was a factor, but only a factor. After performance of the transportation, a charter certificate was presented by IMATA to the service for verification and comparison with the bid. After being approved, the certificate was presented to the disbursing officer who paid the carrier subject to post-payment audit by the General Accounting Office and possible refund pursuant to 49 USCA §66 (1952).

Indeed, it was at the GAO where the carrier ran into heavy weather. Almost from the beginning of the operation the GAO took the position which the Department of Justice still asserts here: (a) for ferry miles actually flown in excess of the bid, the bid controls; (b) for ferry miles actually flown less than the bid, the bid is disregarded, and actual mileage alone counts. The District Court's action only complicated it further. The Court agreed with (b) and ordered the refunds on the Government's cross claim. As to (a) it established a ceiling of June 25, 1953. On all CAM's prior thereto, it agreed with the GAO that the bids set the maximum charge; on those subsequent it disagreed with the GAO and agreed with the carrier that the ferry mileage bid was an estimate only.

II.

The tariff is, as all recognized, crucial. Because each of the parties emphasizes one rather than the other, of

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gers from San Antonio to Memphis, the charter miles referred to this leg. If the bid showed the plane to be at El Paso and to be returned to New Orleans for its next operation, *front* ferry mileage would be shown separately for El Paso to San Antonio and *rear* ferry mileage Memphis to New Orleans.

The difficulties presented here arose when the actual front ferry leg flown was, e.g., from Albuquerque (not El Paso) to San Antonio, i.e., a greater distance, and the rear ferry leg was to Nashville (not New Orleans), i.e., a lesser distance, or other combinations of actual greater or lesser front, rear or combined ferry miles.

various pertinent sections, it facilitates easy reference in our discussion to set them out separately, but in the order they appear in the tariff. By reading the notes (6 to 13) together, as must be done, the whole tariff can likewise be sensed. After limiting it to carriers participating in the tariff and defining military traffic and transportation covered,[6] the tariff set forth the definition of "charterer,"[7] "charter flight,"[8] "charter miles,"[9] "ferry miles,"[10] "application of rates and charges,"[11] "computation of mileage" for charter mileage[12] and ferry mileage.[13]

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[6]"Application of the Tariff:

"This tariff is published and filed * * * on behalf of the following participating carriers * * * for the provision of air Transportation under [CAB]Order No. E-5166, dated March 21, 1951, pursuant to contracts with departments of the military establishment and of uniformed military personnel traveling at their own expense to or from military bases designated by departments of the military establishment."

[7]"Charterer: means a person, group of persons, firm, partnership, association, corporation or body politic acquiring,
[1] at a fixed charge,
[2] the use of an aircraft operated by Carrier for
[3] the transportation of persons
[4] from a specified origin to a specified destination or
[5] for a particular itinerary,
[6] agreed upon in advance."
Note: brackets inserted.

[8]"Charter Flight: Means air transportation and identical service furnished by a carrier to a charterer in a chartered aircraft beginning at the time the chartered aircraft is made available for occupancy or loading at origin and ending when the chartered aircraft is unloaded or discharged at destination."

[9]"Charter miles: Means miles which chartered aircraft is operated by carrier for Charterer, carrying passengers."

[10]"Ferry Miles: Means miles which Carrier is required to operate an aircraft without payload between points where it is based by the Carrier and the origin of a charter flight and between the destination of a charter flight and the point to which the aircraft is to be returned for the next operation by the carrier * * *."

[11]"(A) GENERAL: The charges published in this Tariff are subject to availability of aircraft and shall apply only in connection with the aircraft operated by the Carrier as a common carrier for compensation or hire for the air transportation of military traffic in accordance with Civil Aeronautics Board Order Serial No. E-5631 dated August 21, 1951."

[12]"(A) CHARTER MILEAGE DETERMINATION:
(1) Air miles will be determined by reference to Military Traffic Tariff No. 5, C.A.B. No. 6, * * *
(2) When the source in paragraph (1) above does not provide

Filed as it was under compulsion of §403(a) of the Civil Aeronautics Act of 1938, the tariff carried the statutory mandate of §403(b) that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected.[14] In the implementation of this

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the necessary mileage between airports of origin and airport of destination then reference will be made to * * * 'AIRLINE DISTANCES BETWEEN CITIES IN THE UNITED STATES', Special Publication No. 238, U.S. * * * Coast and Geodetic Survey.

(3) When the source in paragraph (2) above does not wholly provide the necessary mileage then reference will be made to Coast and Geodetic Survey Charts for the additional airway mileage."

[13] "(B) FERRY MILEAGE DETERMINATION:

(1) Air miles will be determined by reference to the Government publication titled 'AIRLINE DISTANCES BETWEEN CITIES IN THE UNITED STATES', * * * U.S. Coast and Geodetic Survey.

(2) When the source in paragraph (1) above does not wholly provide the necessary mileage then reference will be made to Coast and Geodetic Survey Charts for the additional airway mileage."

[14] §403(a), 49 USCA §483(a) (1952 ed.)

"Every air carrier and every foreign air carrier shall file with the Board * * * tariffs showing all rates, fares and charges for air transportation between points served by it * * *."

§403 (b, 49 USCA §483 (b) (1952 ed.)

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier * * * shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. * * *."

Section 403 of the Civil Aeronautics Act of 1938 was applicable at the time. This section has now been superseded by §403 of the Federal Aviation Act of 1958, 49 USCA §1373 (1958 Supp.).

This rounds out a consistent statutory policy covering all modes of interstate transportation. Railroads: 49 USCA §§6, 8, 9, 41-43; Motor Carriers: 49 USCA §§317, 318, 322; Water Carriers: 49 USCA §§906, 916, 917. The stringency of the Elkins Act, 49 USCA §§41-43, and its counterparts for Motor and Water Carriers of imposing severe criminal penalties has an airborne application as well. See 49 USCA §1472(a) and, specifically, (d) (1958 Supp.).

"(d) Any air carrier * * * or any officer, agent, employee, or * * * who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this chapter, or who, by any device or means,

stringent legislative policy, the courts have been equally emphatic that the basis for the charge or credit must be found in the tariff. If it is not in the tariff, it is not allowable. It is not a mere matter of contract. For "a rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law." **Louisville & N.R.Co. v. Dickerson,** 6 Cir., 1911, 191 Fed. 705, 709. "Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes." **American Ry. Express Co. v. American Trust Co.,** 7 Cir., 1931, 47 F.2d 16, 18. The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises.[15]

As a natural corollary to such a dynamic policy prohibiting the possibility or temptation to preferential discrimination—frequently asserted by the sovereign in the punitive enforcement of the Elkins and similar Acts—is the equally uncontradicted legal proposition that estoppel cannot be invoked against a common carrier to avoid a tariff provision. "Neither the intentional nor accidental misstatement of the applicable published rate will bind the

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shall, knowingly and willfully, assist, or shall willingly suffer or permit any person to obtain transportation or services subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000."

[15]See among countless cases: Southern Ry. v. Prescott, 1916, 240 U.S. 632, 36 S.Ct. 469, 60 L.Ed. 836; Texas & P.R. Co. v. Mugg, 1906, 202 U.S. 242, 26 S.Ct. 628, 50 L.Ed. 1011; Armour Packing Co. v. United States, 1908, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681; New York Cent. R.R. v. United States, 1909, 212 U.S. 500, 29 S.Ct. 309, 53 L.Ed. 624; Davis v. Cornwell, 1924, 264 U.S. 560, 44 S.Ct. 410, 68 L. Ed. 848; Chicago & Alton R.R. v. Kirby, 1912, 225 U.S. 155, 32 S.Ct. 648, 56 L.Ed 1033; Gulf, Colorado & Santa Fe R.R. v. Hefley, 1895, 158 U.S. 98, 15 S.Ct. 802, 39 L.Ed. 910; Jones v. Northwest Airlines, 22 Wash. 2d 863, 157 P.2d 728 (1945); Whittenberg v. Eastern Air Lines, E.D.S.C., 1954, 126 F.Supp. 459.

carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay." **Kansas City Southern Ry. Co. v. Carl**, 1913, 227 U.S. 639, 653, 33 S.Ct. 391, 57 L.Ed. 683, 688. It is clear that no "act or omission of the carrier" can "estop or preclude it from enforcing payment of the full amount" of the tariff charges, **Louisville & N. R. Co. v. Central Iron Co.**, 1924, 265 U.S. 59, 65, 44 S.Ct. 441, 68 L.Ed. 900, 902. And "equitable considerations may not serve to justify failure of a carrier to collect, or retention by shipper of, any part of lawful tariff charges," **Baldwin v. Milling Co.**, 1939, 307 U.S. 478, 485, 59 S.Ct. 943, 83 L.Ed. 1409, 1414. **Pittsburgh etc. Ry. v. Fink**, 1919, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151.

III.

The Government does not really challenge this, as indeed it could not. Rather, accepting these propositions its contentions are twofold. First, the tariff contemplates reference to an outside standard, namely, the bids. Second, if not, then the asserted estoppel arises not because of representations or misrepresentations of the terms of the tariff. Rather the estoppel comes into play because of representation of matters outside the tariff and incapable by their nature of being a part of it, namely, points of ferry mile origin and destination. To discuss the first means inevitably that we simultaneously consider Associated's basic contention that the tariff is sufficient, exclusive, and contemplates actual ferry miles flown, whether more or less than bid.

Underlying the Government's delicate process of intrinsic construction of the tariff is the assertion that, as

a legal proposition, the tariff, to be valid and effective, must enable a prospective user at the time of shipment to calculate to the last penny the charges which will be payable if the service is employed. On that foundation, it then proceeds to demonstrate that since points or origin and destination for front and rear ferry legs are not shown in the tariff,[16] nor can they be, it is obvious that the tariff itself affirmatively contemplated the use of "outside" material, i.e., the bid, to supply these missing essentials. Instead, then, of the bid being an external to the tariff, it was very much a part of it although, from the nature of things, mechanically expressed outside of it.

But what is urged as a foundation to an articulate edifice turns out to be the proverbial, and insubstantial, house of cards. For there is no such legal requirement as to the sufficiency of a tariff. The general goal of a tariff is, of course, that it is a statement by the carrier that "it will furnish certain services under certain conditions for a certain price." **Union Wire Rope Corp. v. Atchison T. & S.F. Ry. Co.**, 8 Cir., 1933, 66 F.2d 965, 966. And to accomplish this "they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly." **Atlantic Coast Line R. Co. v. Atlantic Bridge Co.**, 5 Cir., 1932, 57 F.2d 654.

If this contention of the Government of a requirement of preshipment calculation of exact cost were as

[16]The argument that §403(a), note 14, supra, requires that the tariff state the fares and charges "between points served by it" misses the whole point. These are *irregular* carriers, engaged under CAB Economic Regulations, Part 292.1, Reg. Ser. No. 388, 12 F.R. 3076 (1947), in irregular, i.e., unscheduled, service as to time and points of origin and destination. To satisfy any such artificial requirement, the carrier would have to attach an Atlas of the United States.

universal as claimed, an abundant jurisprudence would readily be found to evidence its existence. But its protagonist is hard put to find precedential support. Indeed, the assertion rests on a single quotation from a single case that "it is a general principle of transportation law that tariff rates must be determinable at the time the shipment is made."[17] That Court hardly invested its words with the sweeping meaning now claimed. On the contrary, the action taken recognizes that in essential respects what is payable frequently depends on outside facts — facts which have to be established.

Liability for payment of transportation charges depends solely on the tariff. As **New York Central R. Co. v. York & Whitney**, 921, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016, and **Louisville & Nashville R. Co. v. Maxwell**, 1915, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853, and others so vividly illustrate, it is immaterial whether or not the shipper has accurate knowledge of the charges in advance of shipment. The tariff must furnish the standard upon which the total charges are to be computed on the basis of the actual facts then or subsequently established. It is not essential to a valid tariff that it, alone or by incorporation by reference, afford the tools to a shipper to then and there calculate his dollar cost before shipment is made.[18]

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[17]United States v. Spokane T & S Ry. Co., 9 Cir., 1958, 261 F.2d 681, 684. That case merely determined that applicability of land grant rates depended, not on ultimate use, but upon the intended military use of the cargo at the time the shipment was made.

[18]The practical complex variables of modern transportation would work against that. For example, in rail transportation demurrage on cars is payable for delay in excess of the "free" time. The tariff prescribes the "free time," the rate of demurrage. The amount can only be fixed by proof of time of delivery and return of the cars. In water carriage under Part III, 49 USCA §901 et seq, the tariff would prescribe salvage and general average to be payable by cargo under York-Ant-

IV.

Freed of the necessity of the tariff affording itself or by incorporated standards the means of advance, precise calculation of transportation charges, we come to the construction of this tariff.

In this, both the Government and Associated are too preoccupied with the tariff definition of "charterer," note 7, **supra.** Each engages in a verbalism emphasizing now one, now the other, word or phrase or sentence too much in disregard of the principle that the tariff is to be construed as a whole. Associated, for example, contends that this refers only to the "live" (charter) flight on which passengers are carried. The District Court agreed with Associated's alternative contention. We do not, but we consider this of no significance.

The Government, though, builds its case principally on this single provision. The argument seems to be that since charges may be collected only for a charter, what is a charter is determined by **who** the charterer is. This leads the Government to read as indispensably locked together Clauses [1], [2], [4], [5], and [6] as identified in note 7, **supra.** A charter, then, is an arrangement by which

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werp or other appropriate rules. But ultimate liability or its amount would depend on the occurrence of an incident giving rise to general average or salvage, a legal determination of that fact, and a determination of contributory values and amounts. See. e.g.. United States v. Atlantic Mutual Ins. Co. [Logan], 1936, 298 U.S. 483, 56 S.Ct. 889, 80 L.Ed. 1296, 1936 AMC 993; Prudential S.S. Corp. v. United States, 2 Cir., 1955 AMC 990, at 994-995. Liability for additional payments might depend on protracted litigation. See, e.g., United States v. Atlantic Mutual Ins. Co., 1952, 343 U.S. 236, 72 S.Ct. 666, 96 L.Ed. 907, 1952 AMC 659. Likewise, chartering a vessel constitutes contract carriage requiring the establishment and adherence to minimum rates, etc., 49 USCA §906(e). Under traditional charters, the total amount payable by shipper-charterers would depend on time (in a time charter), cost of fuel, port and other charges, stevedoring, etc. See Gilmore & Black, The Law of Admiralty, 170 et seq (1957).

one acquires "[1] at a fixed charge, [2] the use of an aircraft operated by a Carrier * * * [4] from a specified origin to a specified destination or [5] for a particular itinerary, [6] agreed upon in advance." Then the argument gains altitude to conclude that since the [4] origin and destination or an [5] itinerary must be [6] agreed upon in advance, the phrase "miles which Carrier is required to operate an aircraft" as found in the tariff definition of "ferry miles," note 10, **supra**, obviously contemplates that there must be a firm, fixed agreement in advance on the geographical point at which the front ferry miles commence and the rear ferry miles terminate.

We reject this intricate construction. In doing so we can agree with the Government, and hence disagree with Associated, that [2] "the use of an aircraft operated by Carrier" [3] "for the transportation of persons" does not confine the status of charterer to the passenger carrying leg. But recognizing that one is a charterer with respect to the dead-head legs as well, this definition of charterer, neither alone nor in conjunction with the balance of the tariff, is determinative of mileage or charges. Its function was to make the essential distinction between a party using a planeload service and passengers booked individually.

What was to be payable by one in the defined status of a charterer for a charter flight (defined, note 8, **supra**) was to be determined by applying the respective mileage rates. These were specified in the tables for "charter miles," note 9, **supra**, and for "ferry miles," note 10, **supra**. The tariff is self-sufficient and needs no extraneous agreements or standards. No bid (or acceptance of it) was necessary to determine charges for the passenger leg.

This depended upon facts as to (a) the point of origin and destination as a matter of geography, and (b) computation of mileage on the criteria specified, note 12, **supra**. The ferry legs, front and rear, were specified with equal definiteness. For the front ferry leg it was the "miles which the Carrier is **required** to operate an aircraft * * * between points where [the aircraft] is based by the Carrier and the origin of" the passenger leg. For the rear ferry leg it was the miles "between the destination of" the passenger leg "and the point to which the aircraft is to be returned for the next operation by the Carrier." (Emphasis added.) This standard is mechanically self-executing once it is determined (a) where the aircraft is based preceding the performance of the charter, (b) the point at which the passenger leg commences and (c) terminates, and (d) the point at which the Carrier's next operation is to commence. In such analysis it is, of course, essential that the facts show that the carrier was "required to operate" the aircraft between those points to perform that charter.

Contrary to the contentions of the Government, the element of "required" does not give the carrier a blank check. It is not a license to base a charge on a ferry leg not actually essential. The term is to be given a sensible meaning in the context of actual necessity in an operational sense: e.g., the passenger leg is to commence at San Antonio; in order to pick up and carry the passengers, the plane must first go from El Paso where "it is based" to San Antonio. This does not permit dog-leg flights which prolong the front or rear ferry distance; nor front or rear flights made primarily to secure maintenance. The District Court, on evidence not attacked by any party,

disallowed[19] specific claims of Associated, as would we, because these miles flown were not required to perform the charters—they were done for other reasons.

In the face of an extensive record whose fact findings are unchallenged on this score, it begs the question for the Government to now assert that a ferry leg was not "required" because the Carrier ought not to have accepted subsequent bids which would place the aircraft at front and rear points other than stated in the initial bid. If the bid is not a part of the tariff, it has nothing to do with the tariff element of "required." If the bid controls, then the tariff element "required" becomes superfluous. And in any event, the suggestion ignores the practical problems reflected by this record. Transportation was in critical short supply. Bids were solicited usually four or five days in advance, but sometimes as long as a month. In the meantime, flights were sometimes cancelled by the Government and in other instances intervening

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[19]The District Court disallowed, and we approve, as "not required" the following groups of CAM's:

Dog-leg: Group Nos. 3, 4, 5, 6 (in part) and 7 (passengers aboard but disallowed as dog-leg).

Maintenance: Group Nos. 9a, 9b and Government's counterclaim 15.

The Court allowed Associated to recover Group 11 for crew training flights as the crew training was incidental to the required ferry legs. Of these special types of claims disallowed by the District Court, we disagree only as to two. The first is Group 8 "Passengers Prior to 6/25/53." The only basis for disallowance was lack of knowledge which we hold to be immaterial. It will now be recoverable along with Group Nos. 1a, 1b, 1c which were also disallowed solely for lack of knowledge. The Court, on ample basis, held that these "passengers" in Associated's claim Group 8 and the Government's counterclaim Group No. 16 were mere hitchhikers. The second is Group 10 "Commercial Common Carriage". The Commissioner held that while the mileage was actually flown it preceded or followed commercial, i.e., non-military flights. This fact did not alter the application of the tariff, note 10, supra, as to the place where the aircraft was or was next to be used. It should be treated as did the Commissioner on Counterclaim Group 14. The groups finally allowed and disallowed, identified as they were in the Commissioner's report, are recapitulated in note 33, infra.

bids actually reduced ferry mileage.[20] The last thing the Government wanted was for a carrier to immobilize a plane pending acceptance of a bid and commencement of performance of that charter. The familiar pattern of an urgent exploitation of critical transportation in the defense emergency is reflected by the findings agreed to by both parties. The Court found that "between the time a bid would be submitted to one military agency on a particular flight, another CAM would sometimes be open for bids by that or another military agency involving points in another part of the country." And apart from the knowledge the Court imputed to the Government by reason of the billing changes of June 25, 1953, the Court made the critical (and agreed) finding that "the military agencies generally knew or ought to have known that the carrier representatives in many instances estimated the origin and destination points for the ferry mileage."[21]

The result is that we agree with Associated that the tariff is wholly sufficient and the matter of the Government's knowledge either before or after June 25, 1953, that front and rear ferry points were merely estimated is immaterial. We do, however, consider it appropriate, in the event of further review, that we simply state that if this knowledge were material, we do not agree with the District Court that either flight plans routinely filed or claims, papers and supporting documents filed with the GAO through the reimbursement routine after June 25, 1953, would suffice.

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[20]Included in the Government's counterclaim recovery of $20,843.93 was the sum of $17,567.83 for ferry miles bid but not flown. Much of this saving in ferry mileage resulted from intervening CAM's.

[21]These are findings 13 and 14 with the Commissioner's Report.

V.

In assaying the Government's alternative contention that Associated is estopped from collecting the tariff charge, the construction of the tariff urged by Associated and adopted by us must be taken to be correct. In view of the clear state of the law which forbids any variation from tariff charges by estoppel or otherwise, discussed at length in Part II above, the Government encounters considerable difficulty in sustaining this defense. Indeed, its brief categorically states that it "does not claim an estoppel against the terms of the tariff." Rather, the "estoppel it invokes * * * is an estoppel against repudiation by the carrier of the representations by which it induced the award of the charter contracts on which it sues. Having obtained the charter by a representation to route its aircraft from a certain point to a certain point, Associated was bound in equity and good conscience to perform."

In our approach we need not determine whether, since the representation concerns a future event, this would be a proper application of so-called promissory estoppel.[22] Nor need we determine, as urged by Associated, whether other elements of estoppel are present. Especially is that so in view of the uncontradicted finding that the military services had knowledge of the practice

[22]The Government urges among other authorities the following in support of its view. Annotations, *Promissory Estoppel*, 115 ALR 152, 48 ALR 2d 1069; 1 WILLISTON, CONTRACTS, §139 (Rev. Ed.); Boyer, *Promissory Estoppel: Requirements and Limitations*, 98 U. PA. L. REV. 459; Fridman, *Promissory Estoppel*, 35 CANADIAN BAR REV. 219; RESTATEMENT, CONTRACTS, §90.

of estimating ferry mileage.[23] See note 21, supra. Rather, it is our conclusion that the allowance of any such plea of estoppel under the circumstances would do violence to the clear legal prohibition and would frustrate the policies implicit in the law.

It matters not how thinly veiled or disguised, whether as an illustration of an asserted analogy to misrouting, S. W. Shattuck Chemical Co. v. T. & M. Transportation Co., 10 Cir., 1943, 134 F.2d 394, 395,[24] or a condition upon which the contract of transportation was induced as the Government's brief now puts it, the result would be to open wide the opportunity for rebates and favoritism of the kind which carrier regulatory statutes have long sought to stamp out.

On our construction of the tariff, the mileage "required" to be flown is determinable by actual operating factors. If, as is now urged under the enticing appeal of

[23]We would point out that just as the Government emphasizes that Associated, as a plaintiff, must prove each of the CAM's and all of the elements of a contract to recover, so must the Government establish all elements of its plea of estoppel,, including detriment. So far as this record is concerned and accepting for the moment the making of the bid and the subsequent flying of ferry mileage in excess of that specified, it shows only that the Government *might* be called upon under our construction of the tariff to pay more than in equity it ought to have. But one pleading estoppel must show the detriment in fact. And for all we know many, if not all, of the excess charges were brought about by flight cancellations by the Government or the offering and acceptance of intervening bids. Likewise, had the actual points of origin been accurately stated, the Government would nevertheless have accepted the bid as a matter of military necessity. The burden to overcome these possibilities is indeed a heavy one, but that is the price of estoppel. 19 AM.JUR., Estoppel §42.

[24]That Court's statement, so much relied on by the Government, that the carrier "was duty bound to route them that way because it had contracted to haul them for this amount" creates an entirely erroneous impression. This case did not hold a carrier bound by an estoppel. Rather, it was a question of alternate routings under a valid tariff which prescribed alternative routings. It has nothing to do with our case.

western Sugar & Molasses Co., 5 Cir., 1959, 253 F.2d 922, 925. For the Commission has already acted and its decision, especially on factors of public interest, is entitled to considerable weight. **Southwestern Sugar & Molasses Co. v. River Terminals Corp.**, 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334. The action by the CAB is unique for, unlike the usual situation where action is offered as a precedent only, the action here arises out of these military charters. Subsequent to the decision of the District Court, the military services declined to proffer further charters unless the carriers agreed to be bound by the ferry mileage specified in the bid. Associated attempted to file such a tariff.[29] The Board rejected this as "unlawful for violation of the Board's Economic Regulations in that [the proposal] contained provisions so stated as to render it impossible to determine the application thereof and resultant charges."[30]

Subsequently, the carriers petitioned the CAB to reconsider and accept the tariff or to exempt the carriers from the provisions of §§403 and 404, note 14, **supra.** The Board denied the petition for reconsideration thereby affirming the action of the delegated subordinate. But it then proceeded to grant the exemption from §403. To the military's insistence, which parallel the Government's po-

[29]It prescribed as a substitute for ferry miles, note 10, supra, the following:

"(g) FERRY MILES: Statute air miles between specified points to be flown by an aircraft without passengers or cargo to position the aircraft at the origin of a charter flight and to reposition the aircraft after termination of a charter flight, both agreed upon in advance of the performance of the charter flight. The charterer shall not be liable for any ferry mileage flown by the aircraft in excess of that agreed upon in advance."

[30]The action was taken pursuant to delegated authority 23 F.R. 2946 (1948). The Board's Economic Regulations give the Board power to reject any tariff publication which is not consistent with §403 of the Act and a rejected tariff is void and must not be used. See Section 221.180, 182.

sition here, that it must know in advance of the exact maximum charges on the basis of ferry mileage bid, the CAB held not only that the present tariff did not do so, but it went even further. It stated "an effective tariff cannot be devised which would meet the Military bid requirements at this time and still not violate section 403 * * *."[31] This was a declaration that the tariff as constructed, and as sought to be amended, prohibited the use of extraneous collateral contract bids. Further, it was a determination that since the use of the bids as the basis for the charge was outside the tariff, its use would be forbidden under §403, note 14, **supra,** unless, under the Board's power, §§205 and 416, it determined as a matter of specific public interest, that compliance could be excused. This determination of the public interest feature is a factor committed primarily to its guidance and determination. Implicit in it is a declaration that the policies of the Act against secret rebates and discrimination would be imperiled unless, by specific published order, the carriers for a particular type of traffic may for a limited time resort to agreements outside the four corners of the tariff.

As such, we are in harmony on both the construction of the tariff and the reasons forbidding the use of bids under the guise of estoppel.

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[31]The order provides that solely with respect to charter operations for United States military services, the carriers are "exempted from the provisions of section 403 of the Act and the Board's Economic Regulations to the extent that said section and Economic Regulations would otherwise require such carriers to apply the ferry rates stated in their tariffs to the actual ferry mileage in those cases where such mileage exceeds that estimated in bids or contracts with" the military.

VII.

Finally, we must deal with the tag end controversy on the allowance of costs. The case is to remind counsel who contend with or against the Government that when Justice Holmes talked about turning square corners, he meant square, square corners. For though the Government has the benefit of the efficient labors of the Commissioner (whose fee was paid by both and not here under review) who could render his report with its commendable accuracy only by the use of a stenographic record of these prolonged proceedings, it makes the point which the cases so clearly affirm, that it is not liable for costs except by statute.[32] The District Court's effort to do equity and to make each bear one-half of these costs approximating $4,000 is unavailing. The fact that the Government filed a cross claim and both recovered and lost a substantial portion of it does not alter the situation. The lesson is a hard one to learn and can be expensive. But when faced with the sovereign as an adversary, stenographic and similar non-clerk's costs, if they are ultimately to be apportioned, must be handled on a pay-as-you-go basis so

[32]28 USCA §2412 provides: "(a) The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." Sub-section (b) goes on to provide that in the Tucker Act (28 USCA §1346(a)) cases "(b) * * * if the United States puts in issue plaintiff's right to recover, the district court or Court of Claims may allow costs to the prevailing party from the time of joining such issue. Such costs shall include only those actually incurred for witnesses and fees paid to the clerk."

The cases affirm that statutory basis must be found. Ewing v. Gardner, 1951, 341 U.S. 321, 71 S.Ct. 684, 95 L.Ed. 968; United States v. Patterson, 5 Cir., 206 F.2d 345; Coyle Lines v. United States, 5 Cir., 1952, 198 F.2d 195; North Atlantic & Gulf S.S. Co. v. United States, 2 Cir., 1954, 209 F.2d 487; United States v. Poling Russel, Inc., 1954, 2 Cir., 212 F.2d 184.

Here the dispute was over the fee paid to the reporter for preparing the official transcript. Whether paid directly to the reporter or to him through the Clerk, such charge is not a "fee paid to the clerk" as required.

that the matter never gets as far as taxation of costs as such.

The cause is therefore affirmed in part and modified in part and reversed and remanded for further and other consistent proceedings.[33]

AFFIRMED IN PART; MODIFIED IN PART AND REMANDED.

TUTTLE, Circuit Judge, DISSENTING:

With deference to the views of my colleagues, I am constrained to dissent. In the simplest terms in which I am able to state the issue it is: In 1951 irregular air carriers were authorized by action of the C.A.B. to engage in the carriage of military personnel by contracting for charter flights upon the filing of tariffs, the relevant portions of which are set out in footnotes 7 through 13 of the opinion; the military services were using not only air, but also rail and bus transportation; in order to determine which type of transportation to use the military service needed to know the cost of the transportation, even though the cost alone was not always the sole deciding factor;[1] in order to ascertain the cost of a proposed movement the

[33]The net result on remand will be that Associated will recover its claims on Group Nos. 1a, 1b, 1c, 2a, 2b, 2c, 8, 10 and 11 and, only to the extent allowed by the Commissioner, group 6. We agree with the District Court that Associated may not recover on its claims for Groups 3, 4, 5, 7, 9a, and 9b and that part of Group 6 disallowed by the Commissioner. The Government will recover on its counterclaims for Group Nos. 12 and 15 and only that part of Groups 13 and 17 as allowed by the Commissioner. We agree that the Government may not recover on its counterclaims for Group Nos. 14 and 16 and that part of Group 13 and 17 disallowed by the Commissioner.

[1]It is not significant that cost alone did not always control. It is undisputed that cost was a factor in making the comparison, and if it was a factor, it had to be known quite as much as if it were always the controlling factor.

local command requested a bid from a carrier such as the appellee; this bid designated a specified aircraft, showed the place where the passengers were to be picked up, the place to which they were to be flown and also the place where the aircraft was to be based before flying to the point of pick-up of the passengers; it also prescribed the point to which it was to be returned after completing carriage of passengers; if the bid was accepted the plane was flown to the point of pick-up, the passengers were carried, and the plane was returned to the designated point of rest. The two trips flown without passengers were known as "front" and "rear" ferry flights.

Out of the many trips flown (known as CAM's) a number involved ferry flights from points more distant from the point of pick-up than those specified in the bid. The government contends that the rate of pay provided for "ferry miles" as prescribed in the tariff should apply only to the agreed itinerary as stated in the bid, whereas the carrier claims it is entitled to have the rate of pay per mile for the miles actually flown without reference to the points of departure named in the bid.

I agree that the contract of carriage controls, and that the understanding or notice to the agents or officers of the parties is immaterial to the proper determination of the issue before us. The point at which I depart from my colleagues is that I think it clear that the contract of carriage calls for application of the tariff rate to the number of miles between the points between which the parties agreed the chartered plane was to fly rather than between those points between which it did actually fly, if the latter distance was greater.

Of course, no tariff has any life as a contract until it is called into being by a shipper ordering transportation from a carrier. Moreover, I know of no rule of law that prevents a shipper from agreeing with a charter carrier as to what the point of origin, intermediate points and point of destination shall be. For carriers other than operators of chartered transport the cost of the carriage can readily be determined by reference to filed tariffs between fixed points. For a carrier which operates charter service, too, the shipper can readily ascertain the cost of the transportation per mile by reference to the tariff, which states the charge per mile for "live miles" and the lower cost per mile for "ferry miles." But in the case of a charter carrier the shipper cannot know that a plane will be available to it at any given point. This can be known only if the shipper agrees that the chartered plane will be based at a given point. Therefore, the only known quantity for which a bid is of any value at all is: where will the plane be based before flying to the point of pick-up? This is the only element of cost that the using service cannot determine by the simple matter of multiplying the live miles by the known distance between pick-up and destination. Since the record discloses that the mode of transportation used by the military services must be determined by considering the comparative costs of competing forms of transportation, we cannot, it seems to me, hold that the term of the contract which alone furnished the element by which cost could be computed is void and of no effect unless such result is demanded by some positive command of statute or decisional law. It is my opinion that there is no law requiring that we hold that the term of the contract prescribing the point where the chartered aircraft is based is void and of no effect

merely upon a showing that the aircraft was actually flown from some different point to pick up its passengers.

The opinion of the majority is posited on the proposition that the provisions of the tariff are absolutely binding, and they may not be departed from. Certainly that is true as to those matters which the tariff is designed to cover. I have never known, however, of a tariff being designed to determine the terminal points of a shipment to which its rate schedules will then apply. The opinion here finds such determination of terminal points in the definition of "ferry miles," footnote 10, which defines ferry miles thus: "means miles which carrier is required to operate an aircraft without pay-load between points where it is based by the Carrier and the origin of a charter flight and between the destination of a charter flight and the point to which the aircraft is to be returned for the next operation by the carrier."

It seems clear to me that the definition clause was not intended to answer the substantive question of what were the points of origin and destination of the charter at all, but was rather intended to distinguish between "dead head miles" and "live carriage miles" to which different rates apply. Nevertheless, the government does not urge this point, and I assume, for the purpose of expressing the views here, that this definition is controlling. It becomes necessary then to construe it. The opinion of the Court says: "The tariff is self-sufficient and needs no extraneous agreement on standards." It seems to me that this is meaningless or that it is patently incorrect, because the entire formula of rates is to be applied, as to ferry miles, on the number of "miles which the Carrier is required to operate [the] aircraft without payload between

points **where it is based** by the Carrier and the origin of a charter flight." (Emphasis added.) The opinion itself recognizes the need to go outside the language of the tariff to ascertain where the aircraft is based. It approved the trial court's determination that in effect the aircraft were **based** wherever they happened to be immediately preceding their use for a particular CAM so long as they did not get there as a result of a commercial rather than military flight. It also approved the court's finding that the flight from such place was **"required"** unless it was done for maintenance, for carriage, or other passengers, or on a dog-leg route.

It seems to me that there is a fundamental error in the Court's construction of this definition paragraph to fix points of origin and destination. A plane is not necessarily **based** wherever it happens to be at rest. Where it is **based** is a matter of intent on the part of its owners, and it seems to me that what the bid did here, and what it was intended to do, was to fix by agreement where the specified aircraft was to be **based** prior to its being dispatched for the live mileage. The opinion recognizes the necessity to go outside the tariff to find where the plane was based. It simply assumes that it was based wherever it was found. I think it was based where the parties agreed it was based.

Thus, within the terms of the bid, which when accepted, called the tariff into life, and the tariff itself, all the terms necessary to determine the cost of carriage are spelled out. The parties agreed that as to a particular CAM (to use the illustration in footnote 5) the troops were to be carried from San Antonio to Memphis, and that

the plane was to based at El Paso. The using service could then compute the cost for charter miles from San Antonio to Memphis and the ferry miles from El Paso to San Antonio. The bid would thus have some meaning. It would contain all the elements necessary for the using service to compare the cost with competing types of transportation. Now, where it develops that the designated aircraft for the CAM was actually in Alberquerque before being flown to San Antonio, this does not, it seems to me, change the fact that it was based in El Paso as stated in the bid. In other words, I think the answer to the question "where is the aircraft's base from which point the carrier is required to ferry it?" is found by reference to the parties' contract touching on that identical point rather than by asking, "where was the aircraft flown from to pick up the passengers at San Antonio?"

There are several circumstances in this case and in transportation law in general that, it seems to me, strongly support this construction. The first is the introductory clause of the tariff itself:

"Application of the Tariff:

> "This tariff is published and filed ... on behalf of the following participating carriers ... for the provision of air Transportation under [C.A.B.] Order No. E-5166, dated March 21, 1951, **pursuant to contracts with departments of the military establishment** and of uniformed military personnel traveling at their own expense to or from military bases designated by departments of the military establishment." (Emphasis added.)

Thus, it is clear that the tariff clearly assumes, as it must, the making of a contract of carriage. Such a contract must define the service to be performed. It sets out in the definition section next discussed the yardstick to which the tariff rates for the two defined types of ferry flights are to be applied.

The next such circumstance is the definition clause which describes "charterer" as follows:[2]

> "Charterer: means a person, group of persons, firm, partnership, association, corporation or body politic acquiring,
>
> [1] at a fixed charge,
>
> [2] the use of an aircraft operated by Carrier for
>
> [3] the transportation of persons
>
> [4] from a specified origin to a specified destination or
>
> [5] for a particular itinerary,
>
> [6] agreed upon in advance."

Note: brackets inserted:

This clause makes clear that what is dealt with here

[2]As I have previously said, I doubt seriously whether these substantive matters were intended to be controlled by the sections *defining* terms of the contract. However, if we assume the definition sections are to be given such effect, then all of them must be considered.

is a shipper (the government) that has acquired at a **fixed charge** an aircraft for transportation **from a specified origin to a specified destination** or **for a particular itinerary, agreed upon in advance.** Practically every term of the definition emphasizes the idea of an **agreed definite** understanding as to the **origin** and **destination** of the flight and the **charge** to be made. This strongly supports my understanding that the "ferry miles" clause is to be construed to refer to a base already agreed on.

The third circumstance is the general proposition, in my opinion too lightly dismissed by the majority, that the purpose of a tariff is to let the shipper know **what services** a carrier will furnish under certain conditions and at **what price. Union Wire Rope Corp. v. Atchison T. & S.F. Ry. Co.**, 8 Cir., 66 F.2d 965, 966. This Court has said that tariffs "must be expressed in clear and plain terms so that those dealing with and governed by them may understand them and act advisedly." **Atlantic Coast Line R. Co. v. Atlantic Bridge Co.**, 5 Cir., 57 F.2d 654. Is it possible for any one to say here that a shipper would be expected to find the point of origin of a charter flight fixed by the language of a **definition** section when the parties have already attempted to fix it by the contract calling the tariff into life? Also, the Court of Appeals for the Ninth Circuit said of tariffs generally:

> "It is a general principle of transportation law that tariff rates must be determinable at the time the shipment is made." **United States v. Spokane, Portland & Seattle Ry. Co.**, 9 Cir., 261 F. 2d 681.

In rejecting the government's contention that tariff rates must be **determinable** at the time the shipment is made, the majority opinion speaks of it as though it were a contention for "a requirement of preshipment calculation of exact cost." Of course, the government makes no such contention. It merely argues, and I think correctly, that the **formula** by which the charge can be figured and the **yardstick** to which it is to be applied must be contained in the tariff or be agreed to in advance of shipment. Here, unless the specified points of departure are taken as agreed to in the bid, the one essential fact permitting such computation is entirely missing.

It seems to me to be clear that nothing in the tariff had the effect of changing the contractual terms designating the base from which the ferry mileage was to be computed. It seems plain that if the definition section is to be looked to for the purpose of ascertaining what mileage was ferry mileage, it prescribed it as between the place where the parties had agreed the plane was based and the origin of the charter miles rather than, as the Court has decided, between whatever place the plane was found and such place of origin.

The majority criticizes the government for contending that the bid base controls if the plane traveled in excess of that mileage but that the actual miles control if the plane traveled less than the distance between the bid base and place of origin of the charter flight. I think this is strictly in line with general transportation law which prohibits a carrier from collecting for services not actually performed. Moreover, both the bid contract and the definition clause provided for this treatment. The bid con-

tract provided "if the agreed upon ferry mileage can be eliminated or reduced by rescheduling the assigned equipment in regular or chartered services, the benefit of such reduction in ferry miles flown shall be credited back to the [government]." It is against this term of the bid contract that we read the language of the definition section: "miles which Carrier is **required** to operate an aircraft without payload between points where it is based, etc." If the carrier is not **required** to operate the aircraft as many miles as the bid contract specifies, the tariff definition itself excludes the excess miles. Thus it is, that the government contends, correctly I think, that this is a contract that, coupled with the filed tariff, prescribes a maximum charge for the charter service.

That this is not deemed either economically unfair or morally or ethically improper is indicated by the fact that the C.A.B. at the instance of both the **carrier and the government** has, by the granting of an exemption, authorized charter contracts, spelling out this precise arrangement. Civil Aeronautics Board, Order No. E-13158, Docket No. 7186.9916, dated November 14, 1958.

I think, therefore, that this obligation of the government for charter charges was fixed by the tariff based on the stated base of the aircraft in each CAM less such amount as represented mileage not actually flown between the specified base and the place of origin of the charter flight. What has been said relating to the front ferry miles should, of course, be applied equally to rear ferry miles. This is: the mileage payable to the **specified** point of rest is the maximum for computing the charter cost, the actual mileage flown, if less than that, to be the actual basis of the charge.

We are told by the government that the method of computation, which I think is called for, was acquiesced in by the carriers for the first two years of these operations. 33 Comp. Gen. 483,487. Such conduct, of course, would not be effective to change the contract of carriage, since one of the significant things about tariffs, agreed to by all members of the court, is that the parties cannot by agreement change the filed tariff. It is significant, however, I think, when we are faced with a problem of construing the contract, since the construction placed upon it by the parties is somewhat persuasive as to its proper construction.

I would reverse the judgment and remand for a finding of the sum due the parties in accordance with the legal principles enunciated here.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
April 19, 1960

APPENDIX E

28 U.S.C. §1346

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while

acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States. June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2 (a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50 (b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX E

28 U.S.C. §1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

APPENDIX E

31 U.S.C. §203

§ 203. Assignments of claims; set-off against assignee

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust

company, or other financing institution, including any Federal lending agency: **Provided,**

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor

on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued. R.S. § 3477; May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41.